UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LEGACY CHARTER, LLC d/b/a
LEGACY TRADITIONAL SCHOOL

and Case 28–CA–201248

CARMEN HORSTMAN, an Individual

Stefanie J. Parker, Esq.,
for the General Counsel.
John L. Blanchard & Nathan T. Arrowsmith, Esqs. (Osborn Maledon, P.A.),
for the Respondent Employer.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In late January 2017, the principal of the Legacy Traditional School in Gilbert, Arizona decided not to renew the annual employment contract of a veteran 6th grade teacher, Carmen Horstman, for the following 2017-2018 school year. Horstman subsequently filed an unfair labor practice charge, and the NLRB's General Counsel issued a complaint, alleging that her contract was not renewed because she repeatedly raised concerns with the principal and high-level managers about various working conditions impacting her and other teachers, in violation of the National Labor Relations Act (NLRA). The complaint also alleges that Legacy unlawfully maintained certain overbroad and discriminatory provisions or rules in its standard employment contract and employee handbook.

Legacy denies the allegations. It contends that the NLRA does not even apply to the school because it is a charter school administered and supervised by the State of Arizona. It further contends that, even assuming the NLRA does apply, the principal lawfully decided not to renew Horstman's contract and the school lawfully maintained the challenged rules in its employment contract and employee handbook.

A hearing to litigate these jurisdictional and unfair labor practice issues was held on May 1–2, 2018.[1] The General Counsel and Legacy thereafter filed briefs on June 29. As discussed

[1] On Dec. 19, 2017, Legacy filed a prehearing motion to dismiss the complaint for lack of jurisdiction. The NLRB denied the motion by unpublished order dated April 25, 2018 on the ground that Legacy had failed to establish that there were no genuine issues of material fact warranting a hearing and that it was entitled to judgment as a matter of law (2018 WL 1963784).

below, a preponderance of the evidence establishes that Legacy is an employer subject to the NLRA and that it unlawfully decided not to renew Horstman's contract for the 2017-2018 school year as alleged. As for the challenged rules, two (the dress code and the solicitation rule) are unlawfully overbroad, and three (the confidentiality provision and the rules addressing computer and email usage and false statements) are not.[2]

I. JURISDICTION

Legacy Charter, LLC d/b/a Legacy Traditional Schools operates charter schools in various locations in Arizona through CFE Management Group, a charter management company.[3] Legacy's Gilbert school received its charter in the spring of 2013 through a contract with the Arizona State Board for Charter Schools (the State Charter Board), one of several state agencies or entities authorized by statute to sponsor charter schools in the state.[4] The school currently enrolls approximately 1100 students in kindergarten through the 8th grade, and employs 93 total staff members, including 53 teachers.

The test for determining whether an employer is an exempt public entity or "political subdivision" under Section 2(2) of the NLRA is whether the employer is either: (1) created directly by the state, thereby constituting a department or administrative arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. *Excalibur Charter School, Inc*., 366 NLRB No. 49, slip op. at 1 (2018), citing *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971). Legacy argues that it satisfies the second of these alternatives, as the State Charter Board must approve

[2] Citations to the record are included to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] Legacy's Gilbert school is registered with the Arizona Corporation Commission as a domestic nonprofit corporation. See https://ecorp.azcc.gov/PublicBusinessSearch/PublicBusinessInfo?entityNumber=18113776. Consistent with the General Counsel's request (Br. 4), judicial notice is taken of the public registration under FRE 201. See, e.g., *Tocci v. Antioch University*, 967 F.Supp.2d 1176, 1193 n. 6 (S.D. Ohio 2013); and *Thomas v. New Leaders for New Schools*, 278 F.R.D. 347, 349 n. 5 (E.D. La. 2011).

[4] By statute, only the Arizona State Board for Charter Schools, the State Board of Education, a university under the jurisdiction of the Arizona Board of Regents, a community college district, or a group of community college districts may sponsor a charter school. See Ariz. Rev. Stat. (A.R.S.) § 15-183.C; *Legacy Education Group v. Arizona State Board for Charter Schools*, 2018 WL 2107482, at *1 (Ariz. App. May 8, 2018); and *Doe v. Heritage Academy*, *Inc*., 2017 WL 6001481, at *4 n. 4 (D. Ariz. June 9, 2017).

anyone Legacy appoints to be a member of its governing board and may also order Legacy to remove a board member.[5]

As indicated by the General Counsel, Legacy's argument is contrary to existing law. It is true that a charter school must include a list of its board members with its charter application and notify the State Charter Board through the charter amendment process when it appoints new board members. However, the State Charter Board approves the governing board members selected by the charter school only in the sense that the State Charter Board may reject the charter application or amendment if a background, credit, and fingerprint check reveals that a member has a criminal, financial, familial, or other professional or personal history or relationship that would bar serving under state laws and regulations, pose a threat to the health and safety of the students or the financial security of the school, or otherwise adversely impact the school's ability to perform the educational, operational, and business plans set forth in the application and charter.

If a charter school refuses to remove a member that the State Charter Board has objected to based on the above considerations, the State Charter Board could also take certain oversight action, including imposing a civil penalty, temporarily withholding up to 10 percent of the school's monthly state aid, and/or revoking the school's charter following an administrative hearing and subject to the school's right to file an appeal in state court. But, the State Charter Board has no authority to directly appoint or remove members itself.[6]

It is clear under NLRB precedent that such state contracting and oversight authority is insufficient to establish that a charter school's governing board is responsible to public officials or the general electorate. See *Excalibur Charter School*, above (finding that another Arizona

[5] Legacy acknowledges that the first alternative is not applicable here, i.e. that it is not created directly by the State of Arizona. See p. 3 of its prehearing motion to dismiss, which is incorporated by reference in its posthearing brief. Legacy also admits, and the record establishes, that it satisfies the NLRB's commerce standards for asserting jurisdiction. The record does not reveal any specific information about Legacy's governing board or its members.

[6] See A.R.S. § 15-183; R. Exhs. 12 (Ariz. Admin. Code Title 7, Ch. 5, as amended effective May 6, 2017), 17 (charter contract), 25 (charter application); and Tr. 31–34, 46–50, 54–55, 59–60, 63–64, 73, 78–83 (testimony by State Charter Board Executive Director Ashley Berg). See also *Shelby School v. Arizona State Board of Education*, 192 Ariz. 156, 962 P.2d 230 (App. 1998); *Dove Learning, Inc. v. Arizona State Board for Charter Schools*, 2008 WL 4108122 (Ariz. App. March 6, 2008); and *Founding Fathers Academies, Inc. v. Arizona State Board for Charter Schools*, 2016 WL 5939358 (Ariz. App. Oct. 13, 2016). For example, in response to several hypotheticals posed by Legacy's counsel, Berg testified that the State Charter Board might disapprove a school's board member if he/she had been convicted of sexual abuse, severe domestic violence involving children, or embezzlement (54–55). It might also disapprove a member whose addition would create a quorum of family members on the school's board to avoid potential violations of the state open meeting statute (Tr. 32–33, 59–60), which the state attorney general has determined applies to charter schools (see *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 809 (9th Cir. 2010) (discussing the attorney general's 1995 opinion)).

charter school sponsored by the State Charter Board was not a public entity).[7] See also *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 7–8 (2016); and *Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88, slip op. at 6–7 and n. 19 (2016). Compare *Universal Academy*, 366 NLRB No. 38 (2018) (finding that a Texas charter school was a public entity exempt from the NLRA because the Texas Commissioner of Education had the authority to reconstitute a charter school's governing body by appointing new members and retaining any of the incumbent members).

Legacy alternatively argues that additional factors other than appointment and removal of governing board members should be considered; specifically, the State Charter Board's authority to conduct site visits and periodic reviews; to audit and inspect books, accounts, records, and files; to investigate complaints; and to require a charter school to take corrective action subject to the oversight actions discussed above, up to and including revoking the charter contract, for noncompliance. However, again, NLRB precedent holds to the contrary. See *Excalibur Charter School,* above, slip op. at 2, citing *Pennsylvania Virtual Charter School*, above, slip op. at 9 ("Where an examination of the appointment-and-removal method yields a clear answer whether an entity is 'administered by individuals who are responsible to public officials or to the general electorate,' the Board's analysis properly ends.")

Finally, Legacy argues that the NLRB should exercise its discretion under Section 14(c)(1) of the NLRA to decline jurisdiction over all charter schools as a class. However, this would likewise require overruling precedent. See *Pennsylvania Virtual Charter School*, above, slip op. at 9–10; and *Hyde Leadership Charter School-Brooklyn*, above, slip op. at 7–9.

II. Alleged Unfair Labor Practices

A. *Nonrenewal of Horstman's Employment Contract*

1. The Relevant Facts

Horstman was a founding teacher of the Gilbert school, i.e., she began teaching there in July 2013, the very first year of its charter. She was a so-called "self-contained" 6th grade teacher, meaning she taught the entire 6th grade general curriculum in her classroom. She also served as the 6th grade team leader during her second and third years at the school, responsible for communicating information to the other 6th grade teachers on behalf of the school's principal, Valerie Merrill.[8] She was considered a good teacher at all levels of management. Her students had passage rates on the state standardized test (AzMerit) equal to or above the 6th grade average passage rates for the school; she was rated "highly effective" overall, the highest

[7] Although the evidentiary record in *Excalibur* was made in 2010, the updated record here fails to establish that the State Charter Board's authority regarding the appointment and removal of charter school board members significantly or materially increased as of January 2017.

[8] Merrill became the school principal in 2014, in the middle of the school year (Tr. 86, 123). Horstman decided not to continue as the team leader after she had her first child in February 2016 (Tr. 199). She was succeeded by fellow 6th grade teacher Michelle Harrington (Tr. 137). The team leader is not a supervisory position (Tr. 165).

rating teacher rating, by Merrill; and she had no history of progressive discipline, prior to the relevant events here.[9]

Like other teachers, Horstman was employed on a year-to-year basis, i.e., each year she and the school executed a new employment contract for the following school year. For example, the employment contract for her last, 2016–2017 school year was effective for just 10 months, from July 19, 2016 to May 26, 2017. The contract renewal process typically occurred in January of each year for the next school year. Merrill "interviewed" the teachers to determine if they wanted to return and reviewed their prior performance evaluations and classroom observations. She also considered the annual AzMerit passage rates by the teacher's students. The passage rates were important as they could impact state funding, student enrollment, and the ability to attract highly effective educators. However, the passage rates were not released until the spring at the earliest. So, Merrill had to rely on the teacher's prior passage rates in deciding whether to renew a contract. Although she would sometimes wait until the latest percentages were received, she did not usually do so because it would leave less time, and make it more difficult, to recruit and hire a replacement if she ultimately decided against renewal.[10]

In the months leading up to the January 2017 contract renewal process, several relevant events occurred.

Increase in teacher workload (n*ew curriculum and technology).* In the fall of 2016, after the school year had already begun, the school instituted a new English language arts (ELA) curriculum called "Journeys" at the direction of the district. The new curriculum required the teachers to learn and use numerous new textbooks and types of multimedia and to revise their instruction plans. Around the same time, the school also asked the teachers to begin

[9] See Tr. 107, 122–123, 199, 238–239, 246, 248, 275–276, 289; GC Exh. 6, p. 1 (Merrill's post-nonrenewal May 26, 2017 performance evaluation of Horstman, indicating that she had rated Horstman "highly effective" on her previous 2016 performance evaluation); GC Exh. 9, pp. 3–4 (the Spring 2016 passage rates of Horstman's students compared to the average school passage rates on the 6th grade AzMerit math and English language arts (ELA) test), and R. Br. 18–19. The Spring 2016 passing percentage for Horstman's students on the ELA portion is difficult to make out on the exhibit; however, it appears to be a number that is approximately the same or higher than the Gilbert school 6th grade average.

[10] See Jt. Exh. 4 (Horstman's 2016–2017 contract); and Tr. 90, 96–97, 124–125, 285, 291–292. Merrill testified that she started the renewal process around December by having several discussions with her superintendent about the teachers' evaluations and student achievement and test scores, and that she and the superintendent then "worked through together who we're recommending for renewal" (Tr. 121). However, Paula Jensen, who was Merrill's deputy/acting superintendent in the 2016-2017 school year, testified, consistent with the documentary evidence, that Merrill did not speak to her about renewals for the 2017–2018 school year until January 2017, and that Merrill simply told her who was not going to be renewed and why so that the district's acquisition team could start recruiting replacements. She denied that Merrill and the other teachers she supervised sought her advice or input regarding whether to renew teachers or that she otherwise participated in making those decisions. See Tr. 285–286, 290–292; and GC Exh. 5.

incorporating technology, including "COWs" (computers on wheels), into their classroom instruction in line with state standards. As a "traditional" back-to-basics school, Legacy had not previously required or expected the teachers to use technology in the classroom. Horstman had a couple conversations with Merrill around that time about the difficulties and frustrations she and other teachers, including fellow 6th grade teacher Michelle Harrington, were having in implementing the new curriculum and technology requirements and revising the instruction plans in the middle of the school year.[11]

Increase in time it took to dismiss students (Driveline). At the end of each school day, the students were dismissed using a computerized system called "Driveline." Each student was given a code number and was not dismissed until a parent arrived at the school and an attendant inputted the code number in the computer, which notified the teacher that the parent had arrived and at which exit. The system was designed to make dismissal more organized and thereby ensure that students got safely and quickly to their parents' vehicles without standing out in the Arizona heat too long. However, it took a while to complete, typically about 30 minutes. And in the fall of 2016 it was taking even longer, sometimes up to an hour. Horstman and Harrington had a couple conversations before the fall break about how very difficult it was to manage their students during such a long dismissal period.

In mid-September Hortstman spoke to Merrill about the issue. She told Merrill that she and her fellow 6th grade teachers, including Harrington, were frustrated and struggling with how to manage and provide activities for the students during such a long dismissal period. Merrill subsequently talked to Harrington about it after the fall break, and Harrington confirmed that she was frustrated with the longer dismissal period. However, she told Merrill that she had thought up a game during the fall break for the students to play; that the game was working; and that the long dismissal period was therefore no longer an issue for her.[12]

Dispute over amount of teacher class-count stipend. In July 2016, Merrill informed the teachers that Legacy would be offering a stipend to teachers who enrolled more than 30 students in their classes during the year in order to reduce the waiting list of students who wanted to attend the school. At the time, Horstman and Harrington thought Merrill said they would receive $250 per additional student. However, when Merrill subsequently informed them in mid-September of the stipends that were included in their first paycheck, the amounts were not what they expected. For example, although Horstman enrolled two additional students, Merrill informed her she would receive only $250. Further, there also appeared to be inconsistencies. For example, another teacher, who taught kindergarten, sent Horstman a screenshot of her paycheck, which showed that she received a different amount even though she likewise enrolled two extra students.

On September 22, therefore, Horstman emailed Merrill to inquire about the matter, and Merrill came by later that day to talk about it. Horstman told Merrill that she had spoken to

[11] Tr. 135–137, 141, 282 283, 319.

[12] Tr. 131–133, 150, 178–181; GC Exh. 3. There is no evidence that the game worked for other teachers. Harrington testified that her game did not work for other teachers who tried it (Tr. 180).

several other teachers and they all recalled Merrill saying it would be $250 per student. Merrill admitted that other teachers had contacted her about the issue as well, but said she did not recall saying that, and if she did, she misspoke. Horstman suggested that Merrill send out an email to clarify the matter, as "people were talking about it" and it was kind of a "white elephant" in the building. But, Merrill said she didn't feel that was necessary as only a small percentage of teachers received the stipend.[13]

Elimination of afternoon student recess. At the beginning of the 2016–2017 school year, the school eliminated the second, 10-minute recess period at the direction of the district because it reduced the school's instructional minutes. Horstman thought the second recess should be retained because it helped break up the afternoon and keep the students engaged in the classroom. She told Merrill so and gave her some research to support it in late September.[14]

September 28 conversation with Bressler. On the morning of September 28, Horstman stopped in Harrington's classroom to chat after the two of them dropped their students off at special classes. Horstman had picked up her mail from the mailbox on the way and noticed that Merrill had returned the research she had given her about the benefits of recess. She mentioned it to Harrington and they began talking about how difficult it had been to keep the students engaged, especially the boys, since the afternoon recess was eliminated.

At that point, the assistant principal, Ryan Johnson, walked in. Johnson's background was in physical education (PE), and he had previously been the district athletic coordinator. Horstman told Johnson what they were talking about and handed him the research. Johnson replied that they didn't need to convince him; he was "the PE guy." He told them they needed to convince William Bressler, the chief academic officer for CFE Management, since "he's the one who took PE away." The three of them then began talking about the problems with Driveline.

Several minutes later, Bressler also walked into the classroom. He visited the Gilbert campus several times a year for meetings or visitor tours, and often stopped by to say hello to the teachers he knew, including Horstman. Horstman said, "speak of the devil, we need to talk to you about recess," and told him about their prior discussion of the subject. Bressler replied that he would love to restore the second recess but he would have to extend the school day by 5–10 minutes to have enough instructional minutes.

Bressler then asked them how the year was going in general. In response, Horstman mentioned Driveline and asked him if he could explain why it was taking so long. Bressler asked how long it was taking, and they told him it was taking up to an hour, until 3:30 pm, some days. Bressler replied, "well, that's a soft toss; Ms. Merrill just needs to enforce the rules and have parents pick kids up by 3:15."

The conversation ended at that point, as it was time to go get the students from specials. Harrington and Johnson left first, and Horstman and Bressler followed shortly after. As they were leaving, Horstman mentioned the class-count stipend issue to Bressler, asking if he knew

[13] Tr. 138–139, 170–172, 177–178, 201–212, 251–252; GC Exh. 10.
[14] Tr. 123, 213–215.

what the amount was, as people were still wondering about it. Bressler replied that he didn't know, but he would find out, and called the district office on his cell phone. However, no one answered. So he suggested Horstman contact human resources. He also said he would let her know if he found out anything, and told her to come see him if she had any other things to talk about.[15]

Later that morning, Bressler called Merrill and told her about his conversation in Harrington's classroom about Driveline. He told Merrill that Horstman had said that Driveline was going so long that she had to take other teacher's students because they had to leave their classrooms to coach or do clubs, and that it "was no different than babysitting." He asked Merrill to "do him a favor" and "wheel the COW[s]" down to Horstman's classroom during dismissal. Merrill and Johnson thereafter did so, telling Horstman that Bressler had told them to put the computers in her classroom. Horstman asked what she was supposed to use them for. Merrill replied that she didn't know; that Bressler had just said to take the COWs to her classroom during dismissal; and that she should ask Bressler herself.[16]

Horstman had already emailed Bressler around 1:30 pm thanking him for listening to their concerns in Harrington's classroom and taking him up on his offer to come see him if she wanted to talk further. She asked him to send her a few days/times that he would be available for her to sit down with him and share some of her "ideas about how Legacy could continue to grow and find success." However, she was concerned about Merrill's tone and demeanor when she and Johnson dropped off the COWs. Horstman thought Merrill seemed annoyed and visibly upset with her. Horstman assumed it had something to do with the conversation with Bressler, as she and Merrill had a very positive and friendly relationship up until that time. So she called Bressler that evening and left a voicemail telling him what had happened.[17]

September 29 meeting with Merrill. The following afternoon, Merrill emailed Horstman and asked her to "swing by her office" as she want to "touch base" with her before she left for the day. Horstman thereafter met with both Merrill and Johnson in the conference room. Merrill said she knew Horstman had some frustrations, and wanted to touch base with her to see how her year was going. She asked what Horstman had talked to Bressler about. Horstman told her she had talked to him about recess and Driveline. She said she had done so in an effort to try and

[15] Tr. 178, 215–220, 258, 315–318, 322–327; GC Exhs. 11, 14.

[16] Tr. 224–225. Merrill testified that she had a second conversation with Horstman about the COWs later the same afternoon after dismissal (Tr. 134). However, there is no mention of such a conversation in her notes for that day. Rather, as discussed infra, her notes and the record as a whole indicate that the second conversation she described in her testimony occurred after dismissal the following afternoon, September 29.

[17] Tr. 133–134, 152, 224, 254–255, 258; GC Exhs 3, 14. See also Merrill's testimony at Tr. 122–123 (discussing the "casual, friendly" working relationship she and Horstman had during her first few years at the school). Merrill testified that Bressler had called her "later in the afternoon," at the end of the school day during Driveline, when she was "usually running around trying to find kids, make sure they're going out the right doors" (Tr. 133–134). However, Merrill's notes for September 28, 2016 (GC Exh. 3), which she testified she wrote at the end of the day (Tr. 93), state that Bressler called her at 11:30 am.

solve some of the problems that had been an issue for her and Harrington. She apologized if she had gotten Merrill in trouble or caused her problems with Bressler, noting that Merrill had seemed very upset and annoyed at her when she and Johnson had wheeled the COWs into the classroom. Merrill replied,

> No, it didn't cause problems; it just made you look like you were a complainer. We're a family here at Gilbert Legacy, and when you have guests on campus, it's just like at home. When you have a guest come to your house, you do not air out your dirty laundry. You don't tell them all your problems. So, when Bressler was here, it was not appropriate for you to share with him your frustrations with what was going on.

Horstman said she still didn't understand why they had brought the COWs to her classroom, and asked again why they had done so. Merrill repeated that she "honestly" didn't know; that she had talked to Bressler for only a few minutes and he said to take the computers to Horstman during dismissal. Horstman said she was not going to use the COWs until she had talked to and received direction from him. Although she did not mention her earlier email and voicemail to Bressler, he had not yet replied to either. Merrill told Horstman she should put the students who remain until the end of Driveline on one of the new digital academic programs to help raise their math scores. Merrill responded, as she had in their previous conversations about the teachers' increased workload, that it was very difficult and unfair to get and implement both the new curriculum and new technology in the middle of the school year. Merrill replied that change was inevitable, and that everyone had to buckle down and do what's right and needed to be done for the children. Horstman agreed, and the meeting ended. [18]

[18] The foregoing description of the conversation is based on Horstman's detailed testimony (Tr. 223–226), Johnson's testimony (Tr. 271–274), and Merrill's email, notes, and testimony (GC Exhs. 3, 15; Tr. 134). However, some of Merrill's testimony about the conversation was not credible or consistent with the record as a whole and has therefore been omitted. For example, Merrill testified that Bressler had "specifically" told her that "because [Horstman] had low math scores, that she could be using [the COWs] that additional time in the day for math help, math support for the struggling kids in her classroom." She testified that, based on Bressler's statement, she gave Horstman a "directive" at their meeting to use the COWs during Driveline for that purpose, and that Horstman "refused" her directive. (Tr. 133–134.) However, she admitted during her same testimony that she twice told Horstman that she didn't know why Bressler told her to take the COWs to Horstman's classroom during dismissal, both when she and Johnson wheeled the computers into her classroom and during their subsequent meeting (Tr. 134.) Further, she had previously testified that she simply "suggested" to Horstman that she use the digital academic programs during Driveline (Tr. 132). And her notes for September 29 indicate that Horstman did not specifically refuse to use the digital academic program during dismissal to help raise the students' math scores, but simply complained that it was unfair for teachers to get both a new curriculum and new technology in the middle of the school year (GC Exh. 3). Finally, there is no evidence that Merrill took any further action to require Horstman to use the COWs during driveline or to discipline her for insubordination. In fact, Johnson testified that the school decided thereafter to "change the schedule for how often [the teachers] had to use those computers, kind of lowered it a little bit," to reduce the burden on them (Tr. 272).

November meeting with Jensen. Bressler never did reply to Horstman's email and voicemail. However, he asked Paula Jensen, the district deputy/acting superintendent, to meet with Horstman to hear her thoughts about the Gilbert campus and some of the activities going on. Jensen supervised several principals, including Merrill, and also knew Horstman from her previous visits to the campus and their casual conversations over the years.

Jensen subsequently met with Horstman sometime around early November. They talked primarily about the new curriculum and Driveline. Specifically, they discussed and exchanged ideas and thoughts about whether there were ways the school could help the teachers deal with the increased workload and responsibilities both imposed on them. They agreed that the new curriculum would get easier as the teachers became more familiar with it. As for Driveline, Jensen said she would ask the curriculum coordinator to think up some activities for the students during dismissal and perhaps also solicit ideas from teachers at upcoming grade-level meetings.[19]

January 25 and 27 conversations with Merrill regarding renewal. Horstman spoke with Merrill twice in January 2017 about renewing her employment contract for the following, 2017–2018 school year. The first time was on the 25th outside Merrill's office. Horstman had gone to see Merrill about taking leave for her birthday on the 26th.[20] During their conversation Merrill asked Horstman, who was several months pregnant with twins at the time, if she had decided whether to return the following school year. Merrill noted that a lot of people were asking and assuming that she wouldn't come back, and that she would totally understand if Horstman didn't want to come back.

Horstman replied that she was "still on the fence," and had several factors to consider. She anticipated that she would be out on medically required bed rest for a month before the due date in early June, and would continue on maternity leave for the first few months through September of the following school year. She told Merrill that she was considering her options under the FMLA and ADA during those periods, and also needed to talk to her mother to see if she could come down and help with the twins for the initial period when she returned to work. In addition, she said that she had to consider whether it would make sense financially to renew. She said she was looking into what it was going to cost to put three children under 2 years old in daycare. (As noted earlier, her first child was born a year earlier, in February 2016.) She also said she had about $5,500 in college student loans to pay off, and was looking into whether she was eligible for the student loan forgiveness program.

[19] Tr. 221, 280–285. Horstman testified that they also "hit on" recess during the meeting (Tr. 221). However, Jensen testified that, while there was discussion of recess at the district level, she did not remember discussing it with Horstman that day (Tr.283). Thus, it is reasonably clear that, while recess may have been mentioned, there was no significant discussion of it.

[20] Horstman initially recalled the first conversation with Merrill occurring on the 23rd (Tr. 229). However, the record indicates that it was on the 25th. See R. Exh. 3, p. 0139 (Merrill's January 25th email to Horstman about taking the 26th off, which was what prompted Horstman to go see her); and GC Exh. 10, pp. 4–5 (Horstman's January 25th text message to Harrington after the conversation with Merrill).

The second conversation was 2 days later, on Friday the 27th, in Merrill's office. Horstman told Merrill that she was still on the fence. She said she still needed to get the student loan issue worked out; whether she was eligible for loan forgiveness. She said her husband's bonus was bigger than her salary and she didn't need to work, but she was considering returning because of the loan. She said she also still had to get the FMLA leave and daycare issues worked out. Merrill asked her if she really wanted to come back. Horstman said she did, but she needed to get all of the other things worked out first. Merrill replied that she could be a permanent substitute teacher instead, but Horstman said she was not interested in that. Merrill said, "Well, you have a lot to think about over the weekend," and told Horstman to talk to her husband and to "make sure your mind is right" if she decided to return.[21]

Merrill's January 30 rank order and list of nonrenewed teachers. The following Monday, January 30, Merrill provided Deputy/Acting Superintendent Jenson with a "rank order" of teachers along with a list of those who would not be returning or renewing and why. The rank order listed all teachers in three categories: highly effective, effective, and developing. Merrill listed 27 teachers in the highly effective category. However, notwithstanding that she had previously rated Horstman "highly effective" on both her May 2016 annual evaluation and a recent January 10 classroom observation, she did not include Horstman in that category. Instead, she placed Horstman at the very bottom of the effective category, below the 13 other teachers in that category, and above only 4 other teachers listed in the developing category.

[21] GC Exhs. 3, 10, 16; Tr. 127, 229–236, 256–257, 261–262. Merrill testified that Horstman did not mention any factor other than her student loan during either conversation, and that Horstman specifically said that if she didn't owe another year of payments, she was "done." Merrill testified that she interpreted this to mean that Horstman was only teaching to pay off her loan and not because she loved her job or loved and cared about kids (Tr. 95–96, 127–128, 163). However, there are several problems with this testimony. First, it is unlikely, given Horstman's pregnancy with twins and her documented inquiries to human resources about taking FMLA leave during the next school year, that she would not have mentioned child care and FMLA leave. Indeed, one of her inquiries to HR was on January 24, the day before her first conversation with Merrill. See GC Exh. 16. Second, as indicated above, the record clearly indicates that Horstman was a highly motivated teacher who frequently and openly demonstrated by her interest, involvement, and suggestions that she wanted very much for the school, teachers, and students to succeed. Moreover, Merrill admitted that Horstman said she did not really need to work financially in light of her husband's income. It is unlikely in these circumstances that Merrill would have truly believed or concluded from the conversation that Horstman was teaching just to pay off her student loan. Third, while the record indicates that Merrill was an equally motivated and caring principal, she was not a reliable witness. See, e.g., fns. 10, 17, 18, and 28. Finally, as discussed infra, there is substantial direct and circumstantial evidence indicating, as alleged by the General Counsel, that Merrill's real reason for not renewing Horstman was because she went over Merrill's head with her workplace concerns, not because Merrill thought Horstman did not love teaching or children. In sum, it appears that Merrill seized on and embellished or distorted Horstman's statements in order to provide an alternative justification to upper management for her decision not to renew a highly effective and respected founding and veteran teacher.

The separate list identified 12 teachers who were not being renewed, with a brief explanation. It stated that three of the four teachers who were ranked as developing were not being renewed because of "performance." (Merrill testified that the fourth teacher, who was not mentioned on the separate list, transferred to another Legacy school.). The stated explanations for the other nonrenewals were unrelated to performance, such as "moving," "doesn't want to work with kids anymore," "having a baby and staying home," and "staying home with child."[22]

Horstman was also listed at the end, with the notation "still deciding" (which Merrill testified meant that she herself, not Horstman, was still deciding). However, Merrill subsequently told Jensen that she had decided not to renew Horstman. When Jensen asked why, Merrill said it was because Horstman had told her that she would only return to pay off her student loan. Merrill told Jensen she did not want a teacher on campus that did not want to be there and was not committed to being in the classroom.[23]

January 31 nonrenewal meeting with Merrill. The same day, Merrill sent Horstman a calendar invite to meet with her the following afternoon, on January 31. Horstman did so, meeting with both her and Johnson around 4 pm. After some small talk about Horstman's day and her pregnancy, Merrill said,

> Well, we know you've been going back and forth about what you're going to do next year, we know you've been indecisive about, you know, your situation, so we went ahead and made the decision for you; I'm not offering you a contract.

Horstman asked her why, and Merrill replied,

> Well, you've expressed several times your unhappiness here at Legacy, you've expressed multiple times your unhappiness with the curriculum and the direction that we're heading with technology.

Horstman became emotional and tearful at that point, and said she didn't think it was right or fair for someone who had been with the school for 4 years, was instrumental in laying the groundwork of the school, and had received perfect, highly effective evaluations, to be treated in such a way, to be nonrenewed without any prior indication or warning. Horstman pressed Merrill to explain more fully why she was doing so. Merrill responded that Arizona was

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[22] Although not indicated on Merrill's January 30 list, Harrington also did not return for the 2017-2018 school year. However, there is conflicting testimony about the circumstances. Harrington testified that she was renewed but voluntarily left to teach at a private Christian school (Tr. 182). Merrill, on the other hand, testified that Harrington was not renewed; that she did not offer Harrington a new contract (Tr. 103–104). Fortunately, it is unnecessary to resolve the conflict. No party contends that the circumstances of Harrington's departure are relevant to whether Merrill had an unlawful motive for not offering Horstman a new contract.

[23] GC Exhs. 4, 5; Tr. 94–96, 127, 164–165, 286, 290.

a "right to work state" and she did not need to have or give Horstman a reason.[24] With that, the meeting ended.[25]

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[24] Merrill apparently meant that Arizona is an "at will employment" state. "Right to work" states are those where employers are prohibited from terminating employees who refuse to join a union or to pay dues to cover the costs it incurs in negotiating contracts and filing grievances on their behalf as the certified or recognized collective-bargaining representative of the employee unit. See *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963). "At-will employment" states are those where employers are permitted to fire an employee without notice for any or no reason, provided the discharge would not violate federal law, state law or public policy in certain states, a "just cause" provision in a collective-bargaining agreement, or a similar provision in an individual employment contract. See *Boeing Co*., 365 NLRB No. 154, slip op. at 10 n. 45 (2018). Arizona is both a "right to work" and an "at will employment" state. See *AFSCME Local 2384 v. City of Phoenix*, 213 Ariz. 358, 364, 142 P.3d 234, 241 (2006) (Arizona's constitution and "right to work" statutes prohibit compulsory union membership or "fair share fees"); and *Harper v. State*, 241 Ariz. 402, 404, 388 P.3d 552, 554 (App. 2016) (Arizona's "at will" employment law permits an employer to terminate employees at its pleasure with or without cause unless specifically contracted otherwise or the termination violates a state statute or a public policy as set forth in or arising out of a state statute). However, Horstman's individual employment contract specifically stated that it could only be terminated "for cause" (Jt. Exh. 4, p. 2, par. 14). And her contract was not actually terminated; it was not renewed. Although Arizona law affords certain renewal rights and protections to "continuing" school teachers—certified teachers who have been and are currently employed by the school district for the major portion of three consecutive school years and have not been designated in the lowest performance classification (A.R.S. § 15-538.01)—these rights do not apply to charter schools. See A.R.S. § 15-183.E.5 ("The charter of a charter school shall . . . "[e]nsure that, except as provided in this article and in its charter, it is exempt from all statutes and rules relating to schools, governing boards and school districts"); and R. Exh. 17 (standard charter contract).

[25] See Horstman's testimony (Tr. 237–239) and her contemporaneous notes (GC Exh. 17). Merrill did not testify in any detail or produce any notes about the January 31 meeting. Nevertheless, Legacy argues that Horstman's testimony and notes should be discredited because: 1) Horstman "originally" claimed that Legacy had discriminated against her because of her pregnancy and medical condition, citing a charge she filed with the Equal Employment Opportunity Commission (EEOC); and 2) Johnson testified that he did not remember Horstman taking notes during the meeting. See R. Br. 22–23, 34–35. However, Horstman did not file the EEOC charge until August 30, 2017, months after her NLRB charge, and after Legacy filed its position statement with the NLRB denying that it retaliated against her because of her complaints about the new curriculum and technology. See R. Exh. 1 and the discussion of post-nonrenewal events, infra. In any event, only an employer knows for sure why it takes an adverse action against an employee. And it is not unusual or inconsistent for an employee to reasonably suspect more than one possible unlawful reason and to file charges under different statutes to preserve his/her rights and remedies. See *Staffing Network Holdings, LLC*, 362 NLRB No. 12, slip op. at 7 (2015), enfd. 815 F.3d 296 (7th Cir. 2016); and *Gallup, Inc*., 349 NLRB 1213, 1249 (2007). As for Johnson's testimony about the notes, it was unclear. Legacy's counsel asked him if he recalled "whether" Horstman took any notes, and his response was, "I don't recall that, no" (Tr. 268). This was consistent with his responses to other questions about the meeting, which were

Post-nonrenewal events. Later that evening, Horstman sent an email to Merrill stating that, in light of their conversation, she had "started to look at other possible opportunities" and would appreciate a letter of recommendation.[26] Merrill agreed to provide one.

Several months later, on May 26, 2017, Merrill also again rated Horstman "highly effective" on her annual evaluation.[27] She did so notwithstanding that the recent Spring 2017 AzMerit passage rates of Horstman's students in both math and English language arts were slightly lower than the Legacy Gilbert 6th grade averages. The passage rate of Horstman's students in math was 63 percent, the same as the prior year and still in the "effective" range (60–66).[28] But the Legacy Gilbert passage rate rose from 63 to 66 percent. The passage rate for Horstman's students in ELA was 53 percent, in the "developing" range (50–59), whereas the Legacy Gilbert 6th grade ELA average was 56 percent.[29]

Horstman filed her unfair labor practice charge the following month, on June 22, alleging that Legacy had not renewed her contract because of her protected concerted activities in violation of the NLRA. On July 28, Legacy filed a position statement in opposition to the charge with the NLRB Regional Office. Legacy stated that the school

> chose not to renew Ms. Horstman's employment agreement because of her unwillingness to comply with School policies and the School's reasonable judgment that she was no longer a motivated and dedicated teacher. Ms. Horstman was not rehired for the next school year as a result of her poor performance and attitude and not because of workplace protests or complaints.

Legacy explained that Horstman had "flatly refused" Principal Merrill's "instruct[ion]" to use the computers on wheels; she was ranked "as the School's least effective teacher in the school year and her students consistently had low scores in standardized testing"; and she told Merrill she "might only return as a teacher to pay off her student loans."[30]

At the recent May 2018 hearing, Merrill initially denied that Horstman's "unwillingness to comply with School policies" was a reason for not renewing her contract. However, after

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equally vague and uncertain. In sum, Legacy's arguments for discrediting Horstman's testimony are meritless.

[26] R. Exh. 3, p. 0143.

[27] Horstman continued working until late February, when her doctor put her on bed rest. She came back for only 3 days in March, and was out again all of April and May as her twins were born prematurely on April 4. (Tr. 243, 246; R. Exh. 3, p. 0144–0145.)

[28] Merrill testified that the school uses a 70 percent standard, and passing rates consistently lower than that are not considered effective (Tr. 126). However, Legacy's annual evaluation form indicates that passing rates of 60–66 percent are considered effective (GC Exh. 6, p. 3).

[29] GC Exhs. 6, 9. Merrill testified that the low ELA scores were due at least in part to the school's prior curriculum, which as indicated above was not changed until the middle of the 2016–2017 school year (Tr. 136).

[30] GC Exh. 2, pp. 1–2. As previously noted, the following month Horstman also filed a charge with the EEOC. The record does not reveal the status of that charge.

being reminded by Legacy's counsel of the September 29, 2016 meeting, she confirmed that she had directed Horstman to use the COWs during dismissal to improve her students' math scores, and Horstman had refused to do so. She did not testify why she ranked Horstman at the bottom of the "effective" category on January 30, 2017, other than to say that she considered "all kinds of things" in doing the rankings, including test scores, AzMerit scores, classroom observations, student achievement, and conversations that she had with teachers. Nor did she explain why she nevertheless rated Horstman "highly effective" overall in her post-nonrenewal May 2017 annual evaluation.[31]

2. Legal Analysis

Employees have a protected right under the NLRA to concertedly complain or otherwise raise concerns about wages, hours, and other working conditions. Thus, it is an unfair labor practice for an employer to discipline or discharge an employee for doing so. *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 17 (1962). It is also an unfair labor practice for an employer to require an employee to do so only in a particular manner, such as through an immediate supervisor or other chain of command, rather than directly with higher management. See *AFSCME Local 5*, 364 NLRB No. 65, slip op. at 3–4 (2016) (employer violated the Act by maintaining a work rule requiring employees to present any concerns directly to the president, and by suspending and discharging an employee/union officer because she concertedly complained to an executive board member in violation of the rule). See also *Affinity Medical Center*, 362 NLRB No. 78, slip op. at 19 n. 41 (2015) (an employer may not require employees to take all work-related complaints to their employer through "the chain of command"); and *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) (an employer may not require employees to take all work-related concerns through a specific internal process), enfd. sub nom. *Nevada Service Employees Union, Local 1107*, 358 Fed. Appx. 783 (9th Cir. 2009).

As indicated above, the General Counsel alleges that Legacy violated these well-established legal protections and restrictions by deciding not to renew Horstman's contract because she repeatedly raised concerns with Merrill about various working conditions that were adversely impacting her and other teachers, and went over Merrill's head by raising those concerns directly with Bressler (GC Exhs. 1(c), 1(p); Tr. 14–15; GC Br.25–27). Legacy, on the other hand, contends that Merrill decided not to renew Horstman's contract for the various other, lawful reasons stated in its original position statement, and that Horstman's complaints had nothing to do with it.

The parties agree that the appropriate analytical framework in these circumstances is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[32] Under that framework, the General Counsel must prove by a preponderance of the evidence that an employee's protected concerted activity was a

[31] Tr. 91–92, 107–109, 126, 130, 134, 154. Legacy stipulated at the hearing that Merrill, Johnson, Jensen, and Bressler all exercised supervisory authority and were its agents at all material times (Jt. Exh. 1).

[32] The Board's *Wright Line* test was subsequently approved by the Supreme Court in *NLRB v. Transportation Mgt. Corp*., 462 U.S. 393 (1983).

substantial or motivating factor for the discharge or other adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that the employee engaged in protected concerted activity and the employer knew it, and that the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same adverse action against the employee even absent his/her protected concerted activity. See *Shamrock Foods Co*., 366 NLRB No. 117, slip op. at 26–27 (2018), and cases cited there.

The General Counsel clearly established that Horstman engaged in protected concerted activity. As discussed above, Horstman raised concerns directly with Merrill about the increased workload (new curriculum and technology), long dismissal period (Driveline), elimination of the second recess period, and the amount of the class-count stipend. She also raised the same concerns about recess, Driveline, and the class-count stipend with Bressler. Legacy does not dispute that these concerns related to employee wages, hours, and working conditions and were therefore protected by the NLRA. See generally *Mitchell Manuals, Inc*., 280 NLRB 230, 231 (1986). Further, Horstman raised all of the concerns, not just on behalf of herself, but also on behalf of Harrington and other teachers who were similarly affected by the changes or conditions. Thus, the concerns were also concerted. See *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993) ("Concerted activities include actions of individual employees which 'seek to initiate or to induce or to prepare for group action' and actions which 'bring truly group complaints to the attention of management.'"), quoting *Meyers Industries, Inc*., 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The General Counsel also clearly established that Merrill knew that Horstman raised the above concerns on behalf of both herself and other teachers. Horstman specifically told Merrill that other 6th grade teachers, including Harrington, were having difficulty implementing the new curriculum and technology requirements in the middle of the school year. Horstman also specifically told Merrill that her fellow 6th grade teachers, including Harrington, were frustrated and struggling with how to manage and provide activities for the students during Driveline. Harrington later confirmed this to Merrill, telling her that she had been frustrated and spent the fall break thinking of ideas to deal with the long dismissal period.[33] Horstman likewise told Merrill that she had spoken to several other teachers regarding the class-count stipend. And Merrill admitted to Horstman that other teachers had contacted her about the issue. Finally, Harrington was present when Horstman raised the recess issue with Johnson and Bressler in Harrington's classroom, and Horstman specifically indicated to both of them that she and Harrington had been discussing the matter before they came in. Horstman also later told Merrill when she met with her and Johnson the following day that they had discussed both Driveline and recess. While it is unclear whether Harrington's name was mentioned during that meeting, it may reasonably be inferred, in the absence of any substantial contrary evidence, that Johnson and/or Bressler had informed Merrill that Harrington was present and participated in the conversation. See *Airgas USA, LLC*, 366 NLRB No. 92, slip op. at (2018), and cases cited there ("It is well

[33] Although Harrington told Merrill one of her ideas was working for her, and that Driveline was no longer an issue for her, this does not establish that she did not share Horstman's concerns at the time she expressed them to Merrill.

established that the Board imputes a manager's or supervisor's knowledge of an employee's protected concerted activities to the decision-maker, unless the employer affirmatively establishes a basis for negating such imputation.").[34]

The General Counsel also clearly established that Merrill had animus towards Horstman's protected concerted activities. As discussed above, Merrill rebuked Horstman at their September 29 meeting for looking like a "complainer" and airing her "dirty laundry" by sharing her frustrations with Bressler the day before. Given their very casual and friendly working relationship over the previous 2 years, this rebuke confirmed Horstman's impression that Merrill was, in fact, very upset about the matter. Further, Merrill specifically stated at their subsequent January 31 meeting that she was not renewing Horstman's contract because she had repeatedly expressed her "unhappiness" with the school and its implementation of the new curriculum and technology during the school year. As indicated by the General Counsel, this statement, particularly when considered in light of the earlier rebuke, clearly indicated that Horstman was not being renewed because of her protected concerted activity, and was therefore itself unlawful. See *El Paso Electric Co*., 350 NLRB 151, 152 (2007), enfd. 272 Fed. Appx. 381 (5th Cir. 2008), and cases cited there.[35]

Moreover, there is also substantial other, circumstantial evidence of unlawful motive. For example, as discussed above, Merrill offered no explanation for why she had rated Horstman as the least "effective" teacher on January 30, the day before nonrenewing her contract, while rating her "highly effective" on both her previous and subsequent evaluations and observations.[36] And she did not cite the rating or any performance issues as a reason for not renewing Horstman when Jensen asked on January 30. Further, as noted above (fns. 18 and 21), there is no credible evidence supporting the other two reasons cited in Legacy's position statement and Merrill's testimony for not renewing Horstman's contract, i.e., that Horstman refused a directive from Merrill to use the COWs during dismissal to increase math scores, and that she stated or

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[34] In these circumstances, there is no need to address whether it is also appropriate to infer that Merrill knew about Horstman's subsequent meeting and conversation with Jensen about the new curriculum and Driveline.

[35] The January 31 statement is alleged in the complaint as an independent violation. See GC Exh. 1(c), par. 4(e). The September 29 rebuke is not alleged as a violation, apparently because it occurred more than 6 months prior to the charge. See Sec. 10(b) of the NLRA. However, it may properly be considered as background evidence of animus and to explain and give meaning to statements or conduct occurring within the period. See *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960) ("earlier events may be utilized to shed light on the true character of matters occurring within the limitations period"). See also *CSC Holdings, LLC*, 365 NLRB No. 68, slip op. at 4 (2017); *Monongahela Power Co*., 324 NLRB 214, 214–215 (1997); *Grimmway Farms*, 314 NLRB 73, 74 (1994), enf. granted in part and denied in part 85 F.3d 637 (9th Cir. 1996); and *Pittsburgh Coal Works*, 274 NLRB 54, 55 (1985).

[36] Legacy's posthearing brief (p. 19) cites Horstman's students' "below average scores on AzMerit." However, as discussed above, the 2017 AzMerit scores were not available until the spring, well after Merrill made the decision not to renew Horstman's contract. And Merrill rated Horstman "highly effective" overall on her subsequent May 2017 annual evaluation notwithstanding her students' below average scores on the 2017 test.

indicated to Merrill that she was not interested in teaching other than to pay off her student loan. And Merrill did not mention the former to Jensen on January 30 either. See *Shamrock Foods*, supra, slip op. at 27–28, and cases cited there (employer's shifting, false, or exaggerated reasons for an adverse action are evidence of unlawful motive).[37]

Finally, Legacy has failed to establish that it would not have renewed Horstman's contract even absent her protected concerted activities. Indeed, it does not even address the issue in its posthearing brief, choosing instead to rest on its position that the General Counsel failed to satisfy the initial burden. In any event, given that none of the reasons offered by Legacy for the decision not to renew Horstman have any substantial or credible factual or evidentiary basis, Legacy could not possibly satisfy its burden. See id., slip op. at 28; and *Ascent Lounge*, 366 NLRB No. 71, slip op. at 2 (2018), and cases cited there (where an employer's proffered reason or reasons for an adverse action were pretextual, it cannot by definition meet its rebuttal burden). Accordingly, Merrill's decision not to offer Horstman a new contract violated the Act as alleged.

B. *Employee Handbook and Contract Rules*

The General Counsel challenges several rules or provisions in the standard employment contract and the employee handbook that Legacy maintains at all of its locations in Arizona.[38] The General Counsel alleges that, although facially neutral, they are unlawfully overbroad and discriminatory under the analytical framework announced in *Boeing Co*., 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018). In that case, the Board majority held that, unless such a rule has been held to always be lawful or unlawful, a balancing test will be applied in evaluating the rule. Specifically, the majority stated that the Board will initially examine whether, "as reasonably interpreted," "focusing on the employees' perspective," the rule "would potentially interfere with the exercise of NLRA rights." If it would, the Board will then consider whether "the nature and extent of the potential impact on NLRA rights" outweighs the

[37] Arguably, Merrill's refusal to explain her reasons more fully when Horstman pressed her to on January 31 also supports an inference of unlawful motive. See *Phoenix Newspapers*, 294 NLRB 47, 85–86 (1989) (employer's refusal to explain why employee was considered "untrustworthy" warranted inference of unlawful motive). See also *M.J. Mechanical Services, Inc*., 324 NLRB 812, 817 (1997), enfd. mem.172 F.3d 920 (D.C. Cir. 1998); *NLRB v. Cofer,* 637 F.2d 1309, 1313 (9th Cir. 1981); *A.J. Krajewski Mfg. Co. v. NLRB*, 413 F.2d 673, 676 n. 2 (1st Cir. 1969); and *NLRB v. Griggs Equipment, Inc*., 307 F.2d 275, 278 (5th Cir. 1962). But see *Sacramento Recycling and Transfer Station*, 345 NLRB 564, 575 (2005) (declining to draw an adverse inference from the employer's failure to give the discharged employees a specific reason, as they were probationary employees and had been told at the time of hire that the company was an "at will employer"). However, the General Counsel does not specifically make this argument and it is unnecessary to reach the issue in light of the substantial other direct and circumstantial evidence of unlawful motive.

[38] See the General Counsel's April 30, 2018 Notice of Intent to Amend the Complaint, GC Exh. 1(p); and the parties' stipulation at the May 1 hearing, Tr. 264.

"legitimate justifications associated with" the rule, or vice versa. 365 NLRB No. 154, slip op. at 3 and 16.[39]

1. Employment Contract Confidentiality Provision

The General Counsel challenges the following confidentiality provision in the standard employment contract:

> 11. Employee's position with the School will necessarily give, and has given, Employee access to, contact with and knowledge of certain trade secrets and confidential proprietary business information of the School. As a consequence of the acquisition of Confidential information, Employee will occupy a position of trust and confidence with respect to the affairs and business of the School. Thus, it is reasonable and necessary for Employee to meet the covenants herein regarding Employee's conduct during and subsequent to employment with School. Except as required during Employee's employment with School, Employee shall not use for the benefit of any person or entity other than School or disclose or reveal to any other person or entity, either during or subsequent to the term of Employee's employment with School, any Confidential and Proprietary Information belonging to School. Further, Employee will take all reasonable precautions to prevent inadvertent disclosure of any Confidential Information. "Confidential and Proprietary Information" means Information that is not generally known about the School or its business, including, without limitation, about its teaching methods, curriculum, lesson plans, research, techniques, strategies, budgets, projections, contacts, student lists and contact information, and information, business and marketing records, files, systems, suppliers, business plans, marketing plans and strategies, financial or personnel information, and information obtained from third parties under confidentiality agreements. Employee acknowledges that the School's Confidential and Proprietary Information were and are designed and developed by the School at great expense and over lengthy periods of time; are secret, confidential, and unique; and constitute the exclusive property of the Company. Confidential and Proprietary Information does not Include Information

[39] In a footnote, Member Kaplan stated that he "agree[d]" that the Board must "strike the balance between employees' [NLRA rights] and employers' business justifications" in evaluating workplace rules. He noted, "however," that, in his view,

> the threshold inquiry of whether the rule, when reasonably interpreted, prohibits or interferes with [NLRA rights] should be determined by reference to the perspective of an objectively reasonable employee who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA."

Slip op. at n. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F3d 265, 271 (5th Cir. 2017)). See also n. 16 (emphasizing that he would apply an "objective standard, and that the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee").

> that is now in, or that subsequently enters, the public domain other than by Employee's breach of this Agreement or Information that has been independently developed by others; provided that Employee can demonstrate that the information was developed without use or reference to Confidential Information.[40]

The General Counsel contends that the foregoing provision is unlawful because of the prohibitions on disclosing information "that is not generally known about the School," including information about "its teaching methods, curriculum, lesson plans, research, techniques, strategies," or "personnel information" that employees are given "access to, contact with and knowledge of." The General Counsel argues that this would include information that teachers normally acquire in a nonconfidential capacity and typically disclose to nonemployees in furtherance of their protected efforts to improve their employment terms and conditions or (as illustrated by Horstman's unfair labor practice charge challenging her nonrenewal) to enforce their statutory rights.

However, read as a whole, the provision is clearly directed at preventing disclosure of business information that is *both* confidential *and* proprietary. Thus, the very first sentence of the provision states that it is concerned with "certain trade secrets and *confidential proprietary business information* of the School" (emphasis added). And the seventh sentence describes such information as that which was "designed and developed by the School at great expense and over lengthy periods of time; [is] secret, confidential, and unique; and constitute[s] the exclusive property of the Company."[41] Thus, as indicated by Legacy, the provision, as reasonably interpreted from an employee's perspective, would not potentially prohibit disclosure of the types of information described by the General Counsel. Cf. *Mediaone of Greater Florida, Inc.,* 340 NLRB 277, 279 (2003) (finding employer's "proprietary information" rule lawful as its reference to "employee information" appeared within a larger provision prohibiting disclosure of "proprietary information, including information assets and intellectual property" and was listed as an example of "intellectual property").[42] It is therefore lawful under the *Boeing* analysis.

2. Employee Handbook Rules

The General Counsel challenges four rules in the employee handbook concerning dress, solicitation, computer and email use, and conduct (making false statements).

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[40] See Jt. Exh. 4, at LTS 0265–0266.

[41] The General Counsel's posthearing brief fails to mention the language in the first sentence or address the significance of the language in the seventh sentence.

[42] The employee handbook also contains a "Non-Disclosure" rule (Jt. Exh. 2, pp. 4–5). The rule prohibits the disclosure or improper use of "confidential business information and trade secrets," and specifically states that it is "not intended to interfere with an employee's rights under the National Labor Relations Act (NLRA), . . . including concerted discussions or activities regarding the terms and conditions of employment, wages, and working conditions." However, the General Counsel does not challenge the rule, the employment agreement's confidentiality provision does not reference the rule, and Legacy does not argue that the rule should be considered in evaluating that provision. Therefore, it has not been addressed or considered.

Dress code. In relevant part, the handbook "dress code" (Jt. Exh. 2, p. 28) states:

> Employees of LTS are expected to present a clean and professional appearance while teaching in the classroom, working out on the grounds, conducting a meeting or working in the office. If an alternative shoe or clothing item is needed due to a health issue, a current doctor's note (less than a year old) must be supplied to your Supervisor for approval prior to wearing the alternative item. Your doctor's note must be renewed from year to year. Please contact your supervisor or Human Resources for specific dress code questions. Please observe the following guidelines for professional dress:
>
> WOMEN (ALL POSITIONS NOT LISTED OTHERWISE)
> . . . .
>
> Unacceptable
> . . . .
>
> • Clothing with pictures or words, other than Legacy or Logo.[43]
> . . . .
>
> SUMMER OFFICE DRESS CODE
>
> In addition to the items listed under "Women" and "Men":
>
> Unacceptable
> . . . .
>
> • Clothing with pictures or words, other than Legacy or Logo.

The Board has repeatedly held that employees have a right under the NLRA to wear clothing, buttons, and pins containing union or other protected concerted messages, and that a rule prohibiting them from doing so is unlawful unless the employer can show special circumstances justifying the restriction. See *Arden Post Acute Rehab*, 365 NLRB No. 109, slip op. at 17–18 (2017); *In-N-Out Burger, Inc*., 365 NLRB No. 39 (2017), enfd. 894 F.3d 707 (5th Cir. 2018); and *Boch Honda*, 362 NLRB No. 83, slip op. at 2–3 (2015), enfd. 826 F.3d 558 (1st Cir. 2016), and cases cited there. There is no indication in *Boeing* or subsequent cases that the Board intended to overrule this precedent in that decision.[44]

Here, the only "special circumstance" cited by Legacy supporting its clothing restriction is that "there [are] specific positions that are required to wear a uniform, so we want our employees to represent our brand by wearing [the] Legacy logo on their polo shirts" (Tr. 298). However, Legacy never identified what those "specific positions" are. Further, the dress code states only that "School logo polo shirts" are "acceptable" for both women and men; it does not

[43] Oddly, the rule does not include the same restriction under the next section entitled, "MEN (ALL POSITIONS NOT LISTED OTHERWISE)."

[44] See, e.g., *Long Beach Memorial Medical Center, Inc.*, 366 NLRB No. 66 (2018).

state that they are required. Indeed, the dress code states that women may also wear "dresses" and "blouses."[45]

Legacy also argues that the rule, as reasonably interpreted, does not prohibit wearing buttons or pins with pictures or words. However, even assuming arguendo this is true, it would not save the unlawful ban on clothing with pictures or words. See *Long Beach Memorial Medical Center,* above, slip op. at 9 (employer's burden of establishing special circumstances for an otherwise unlawful ban is not satisfied simply by showing that all possible alternatives are not expressly banned). Accordingly, the rule is unlawful as alleged.

Solicitation. In relevant part, the handbook rule on "solicitation" (Jt. Exh. 2, p. 34) states:

> Solicitation during school hours is not permitted. . . . Use of your school email account for solicitation is also not permitted.

The Board has long held that rules broadly prohibiting any solicitation during "working hours" are unlawful as such hours include the entire period from the beginning to the end of a work shift, including during meals, breaks, or other periods when employees are on their own time and have a protected right to solicit others to join a union or participate in other protected concerted activity. See *Our Way, Inc*., 268 NLRB 394 (1983) (discussing difference between "working hours" and "working time"). The Board has also held that employers may not prohibit employees from using company computers and email for any solicitation during nonworking time, absent a showing that special circumstances necessary to maintain production or discipline justify such a restriction. See *Purple Communications, Inc*., 361 NLRB 1050, 1063 (2014). The Board in *Boeing* did not disturb this precedent.[46]

Legacy argues that the phrase "school hours" is different because a teacher's standard work schedule is from 7:30 am to 4:00 pm, but students are dismissed between 2:30 and 3:30 pm. However, the record indicates that teachers are not always teaching during school hours (see, for example, the discussion above regarding the September 28 conversation with Bressler after Horstman and Harrington dropped their students off at "specials"). Accordingly, as Legacy

[45] Thus, *W San Diego*, 348 NLRB 372 (2006), cited by Legacy, is plainly distinguishable. See *Casino Pauma*, 362 NLRB No. 52, slip op. at 5 (2015).

[46] See *UPMC*, 366 NLRB No. 142, slip op. at 1 n. 5 (2018) ("[T]he Board in *Boeing* did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests."); and *Rio All-Suites Hotel and Casino*, 28–CA–060841, unpub. Board order issued Aug. 1, 2018 (2018 WL 3703476) (inviting briefs to address whether the Board should adhere to, modify, or overrule *Purple Communications*).

has not demonstrated any exceptional circumstances justifying the restrictions, the rule is unlawful as alleged.[47]

Computer and email use. In relevant part, the handbook rule on "computer and email usage" (Jt. Exh. 2, p. 23) states:

> Computers, computer files, the email system, and software furnished to employees are LTS property intended for business use only. . . .
> . . . .
>
> . . . Email may not be used to solicit others for commercial ventures, religious or political causes, outside organizations, or other non-business matters.
> . . . .
>
> This policy is not intended to interfere with an employee's rights under the National Labor Relations Act (NLRA). Nothing in this policy should be interpreted to prevent, interfere with, or otherwise restrain an employee's legitimate exercise of his or her Section 7 activities under the NLRA, including concerted discussions or activities regarding the terms and conditions of employment, wages, and working conditions.

Considered in isolation, the first two quoted sentences of this rule are unlawful for the same reasons discussed above regarding the solicitation rule. However, they do not exist in isolation. Unlike the solicitation rule, this rule includes a provision specifically and unambiguously stating that it is not intended to interfere with employees' protected rights under the NLRA to engage in "concerted discussions or activities regarding their terms and conditions of employment, wages, and working conditions." As indicated by Legacy, given this additional provision, the rule as a whole, as reasonably interpreted from an employee's perspective, would not potentially interfere with employee rights under the NLRA.[48] Like the confidentiality provision in the employment agreement, it is therefore lawful under the *Boeing* analysis.

Conduct and work rules. In relevant part, the handbook rule regarding "employee conduct and work rules" (Jt. Exh. 2, pp. 34–35) states as follows:

> To ensure orderly operations and to provide the best possible work environment, LTS expects employees to follow rules of conduct that will protect the interests and safety

[47] As discussed below, another provision in the handbook regarding computer and email usage contains a disclaimer or "saving clause" stating that nothing therein interferes with employees' right to engage in concerted discussions about wage and other terms and conditions of employment. However, the solicitation rule does not cross-reference the computer and email usage rule and Legacy does not contend that they should be considered or evaluated together.

[48] The General Counsel's posthearing brief mentions this "saving clause" (Br. 8) but fails to address its significance or cite any case authority holding that it is insufficient. In any event, past cases where the Board has found saving clauses insufficient appear distinguishable on the ground that, unlike here, the clauses were too narrow, vague, ambiguous, or remotely or poorly placed. See *Lincoln Eastern Management Corp*., 364 NLRB No. 16, slip op. at 3 (2016); and *Solarcity Corp*., 363 NLRB No. 83, slip op. at 5 (2015) and cases cited there.

> of all employees and the organization. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including immediate termination of employment:
>
> . . . .
>
> • Making or publishing false or malicious statements concerning LTS, its affiliates, an employee, student, supplier, or client
>
> . . . .

The General Counsel contends that this rule is unlawful because it prohibits any "false" statements, even if not maliciously false. The General Counsel's position is well supported by pre-*Boeing* Board precedent. See *Beverly Health and Rehabilitation Services*, 332 NLRB No.348 (2000); and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), and cases cited there. However, as indicated by Legacy, the first sentence of the rule clearly indicates that the sole purpose of the prohibition on "false" statements is to promote "the best possible work environment." The Board in *Boeing* appears to have overruled the above cases and held that such rules are always lawful because they simply promote civility and harmony in the workplace. See 365 NLRB No. 154, slip op. at 3–4 and n. 15, and 11–15 and n. 76. Accordingly, the rule is lawful.

CONCLUSIONS OF LAW

1. Legacy violated Section 8(a)(1) of the Act by deciding on or about January 31, 2017 not to renew Horstman's employment contract for the following 2017-2018 school year.

2. Legacy also violated Section 8(a)(1) of the Act by telling Horstman on January 31, 2017 that it was not renewing her contract because she had repeatedly expressed her unhappiness with the school and its implementation of the new curriculum and technology during the 2016-2017 school year.

3. Legacy additionally violated Section 8(a)(1) of the Act by maintaining an overbroad dress code and solicitation rule in its employee handbook since at least December 22, 2016.

4. Legacy's foregoing unfair labor practices affect commerce within the meaning of Section 2(2) and 2(7) of the Act.

5. Legacy has not otherwise violated the Act by maintaining employee handbook rules addressing computer and email usage and making false statements, or by maintaining a confidentiality provision in its standard employment agreement.

REMEDY

The appropriate remedy for the violations found is an order requiring Legacy to cease and desist from its unlawful conduct and to take certain affirmative action. With respect to the unlawful refusal to renew Horstman's contract, Legacy must offer to rehire Horstman to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice

to seniority or any other rights or privileges previously enjoyed.[49] Legacy must also make her whole for any resulting loss of earnings and other benefits she suffered from the date she would have returned for the 2017-2018 school year until she accepts or rejects a valid offer of rehire, a reasonable time has passed for her to accept or reject, or the date Legacy establishes that she would no longer have remained employed.[50] Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest compounded daily in accordance with *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). Legacy must also compensate her for her search-for-work and interim employment expenses, likewise with interest compounded daily, regardless of whether those expenses exceed interim earnings, in accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). In addition, Legacy must compensate her for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director allocating the backpay award to the appropriate calendar year, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016). Finally, Legacy must remove any reference in its files to its unlawful refusal to renew her employment contract, and to notify her that this has been done and will not be used against her in any way.[51]

With respect to the overbroad dress code and solicitation rule, Legacy must rescind those rules, notify the employees in writing that it has done so, and republish its employee handbook without the rules or supply employees with inserts to the handbook which state that the unlawful rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules. See *Paragon Systems, Inc.*, 366 NLRB No. 139, slip op. at 3 (2018).

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[49] Legacy does not dispute that a rehire offer is an appropriate remedy. Although there is no evidence that Horstman had made up her mind to accept a renewal offer on or about January 31, 2017, no such evidence is required. Cf. *Alaska Pulp Corp*., 326 NLRB 522, 531–532 (1998) (Michael Bagley) (striker who testified that he was uncertain whether he would return to work if offered the opportunity was nevertheless entitled to be put to the test by a bona fide offer and his backpay period therefore continued until the business closed), enf. in part 231 F.3d 1156 (9th Cir. 2000). See also *Lou's Transport, Inc*., 366 NLRB No. 140, slip op. at 3 (2018).

[50] The Board generally applies a rebuttable presumption that a discriminatee would have remained employed during the entire backpay period absent the employer's unlawful conduct. See *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1132 (2003); and *Dean General Contractors*, 285 NLRB 573 (1987). Although Horstman was hired by Legacy on a year-to-year basis, she had been employed for four consecutive years and therefore had a reasonable expectation of rehire each year. Cf. *Friday Canning Corp*., 255 NLRB 323, 328 (1981) (ordering a similar reinstatement remedy for seasonal migrant workers notwithstanding that they had 1-year employment contracts, as 80–90 percent of them returned each year). See also *Saipan Hotel Corp*., 321 NLRB 116 (1996), enfd. mem. 116 F.3d 485 (9th Cir. 1997). Accordingly, the burden is on Legacy to show at the compliance stage that her backpay should be tolled prior to the date of its rehire offer for some reason unrelated to its unlawful conduct.

[51] The General Counsel also requests that Horstman be made whole for "consequential economic harm." However, awarding consequential damages would require a change in Board law. See *Dura-Line Corp*., 366 NLRB No. 126, slip op. at 4 n. 18. (2018)

Finally, Legacy must also post a notice to employees at the Gilbert school notifying them of its violations and remedial obligations regarding Horstman and the dress code and solicitation rule. Given that the unlawful dress code and solicitation rule are maintained at all other Legacy locations in Arizona as well, Legacy must also post a notice at those locations. However, as there is no record evidence that employees at other locations would be aware of the nonrenewal of Horstman, the notice at those locations need only notify employees of Legacy's violations and remedial obligations with respect to the rules. See generally *Earthgrains Co*., 351 NLRB 733, 739–740 (2007) (discussing circumstances where separate notices are appropriate).[52]

ORDER[53]

The Respondent, Legacy Charter, LLC d/b/a Legacy Traditional School, Gilbert, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to renew employees' employment contracts for the next school year because they concertedly complained or raised concerns about wages, hours, or other terms and conditions of employment or engaged in other protected concerted activities.

(b) Telling employees that they will not be offered a new employment contract because they concertedly complained or raised concerns about wages, hours, or other terms and conditions of employment or engaged in other protected concerted activities.

(c) Maintaining an unlawful dress code and solicitation rule in its employee handbook.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's order, offer to rehire Carmen Horstman to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Horstman whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section above.

(c) Make Horstman whole for her reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section above.

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[52] The General Counsel's posthearing brief agrees that separate notices are appropriate.

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Compensate Horstman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

(f) Within 14 days of the date of the Board's order, remove from its files any reference to the unlawful decision not to renew Horstman's employment contract for the 2017-2018 school year, and within 3 days thereafter, notify her in writing that this has been done and that the decision will not be used against her in any way.

(g) Rescind the unlawful dress code and solicitation rule.

(h) Revise the employee handbook to delete the unlawful dress code and solicitation rule and advise employees in writing that it has done so and that those rules will no longer be enforced.

(i) Republish its handbook without the unlawful dress code and solicitation rule or provide employees with inserts to the handbook which state that those rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules.

(j) Within 14 days after service by the Region, post at its facility in Gilbert, Arizona copies of the attached notice marked "Appendix A".[54] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility, Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current and former employees employed by Respondent at the facility at any time since December 22, 2016.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(k) Within 14 days after service by the Region, post at all other Legacy facilities in Arizona copies of the attached notice marked "Appendix B".[55] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed a facility, Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current and former employees employed by Respondent at the closed facility or facilities at any time since December 22, 2016.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 16, 2018

Jeffrey D. Wedekind
Administrative Law Judge

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to renew your employment contract for the next school year because you complained or raised concerns about wages, hours, or other terms and conditions of employment or otherwise exercised the rights listed above.

WE WILL NOT tell you that you will not be offered a new employment contract because you complained or raised concerns about wages, hours, or other terms and conditions of employment or otherwise exercised the rights listed above.

WE WILL NOT maintain an unlawful dress code and solicitation rule in our employee handbook.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer to rehire 6th grade teacher Carmen Horstman to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Horstman whole for any loss of earnings and other benefits suffered as a result of our unlawful decision not to renew her employment contract, less interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Horstman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days of the date of the Board's order, remove from our files any reference to the unlawful decision not to renew Horstman's contract for the 2017-2018 school year, and

within 3 days thereafter, notify her in writing that this has been done and that the decision will not be used against her in any way.

WE WILL rescind the unlawful dress code and solicitation rule in our employee handbook.

WE WILL revise the employee handbook to delete the unlawful dress code and solicitation rule and advise you in writing that we have done so and that those rules will no longer be enforced.

WE WILL republish the employee handbook without the unlawful dress code and solicitation rule or provide you with inserts to the handbook which state that those rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules.

LEGACY CHARTER, LLC d/b/a LEGACY TRADITIONAL SCHOOL

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-201248 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawful dress code and solicitation rule in our employee handbook.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful dress code and solicitation rule in our employee handbook.

WE WILL revise the employee handbook to delete the unlawful dress code and solicitation rule and advise you in writing that we have done so and that those rules will no longer be enforced.

WE WILL republish the employee handbook without the unlawful dress code and solicitation rule or provide you with inserts to the handbook which state that those rules have been rescinded or set forth new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules.

LEGACY CHARTER, LLC d/b/a
LEGACY TRADITIONAL SCHOOL

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge

or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-201248 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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COMPLIANCE OFFICER, (602) 640-2146.